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IN THE
COURT OF APPEALS OF INDIANA

TIMOTHY A. CHILDERS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 03A01-O512-CR-545
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BARTHOLOMEW SUPERIOR COURT
The Honorable Chris D. Monroe, Judge
Cause No. 03D01-0407-FB-1175 and No. 03D01-0410-FB-1682

October 6, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Timothy A. Childers appeals the trial court's denial of his petition for leave to file a belated notice of appeal and his sentence for manufacturing methamphetamine, as a class B felony,[1] and possession of methamphetamine, as a class D felony.[2]

We reverse in part and affirm in part.

ISSUES

1. Whether the trial court properly denied Childers's petition for leave to file a belated notice of appeal.

2. Whether the trial court erred in sentencing Childers.[3]

FACTS

On June 21, 2004, police officers discovered an active methamphetamine lab in a storage shed located behind a residence in Columbus, Indiana. Precursors were found in the residence. Childers admitted that the methamphetamine lab was his. On July 3, 2004, an officer attempted to pull over Childers for driving with a suspended license. Before the officer could effectuate a stop, Childers pulled over his vehicle and went into an acquaintance's residence. Childers hid methamphetamine in the residence. Officers later apprehended Childers on the front porch of the residence, discovered the methamphetamine and determined that it belonged to Childers.

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[1] Ind. Code § 35-48-4-1.

[2] I.C. § 35-48-4-6.

[3] As Childers has fully briefed this issue and provided a complete record, which allows our review of his sentence, we shall address this issue in the interest of judicial economy.

On July 15, 2004, the State charged Childers with Count 1, manufacturing methamphetamine, as a class B felony, and Count 2, possession of precursors with intent to manufacture methamphetamine, as a class D felony, under Cause Number 03D01-0407-FB-1175 ("Cause No. 1175"). On October 6, 2004, the State charged Childers with Count 1, manufacturing methamphetamine, as a class B felony, and Count 2, possession of methamphetamine, as a class D felony, under Cause Number 03D01-0410-FB-1682 ("Cause No. 1682").

The State and Childers entered into a plea agreement, under which Childers agreed to plead guilty to Count 1 in Cause No. 1175 and Count 2 in Cause No. 1682. The State agreed to dismiss the remaining charges and also agreed to "refrain from filing additional charges against [Childers] regarding Kohl's incident report number SR-0495-04-15 and C.P.D. incident number 04-01714[.]" (App. 42; 171). On November 1, 2004, Childers pled guilty to manufacturing methamphetamine, as a class B felony, and possession of methamphetamine, as a class D felony.

The trial court ordered a presentence investigation report ("PSI"). According to the PSI, Childers had been adjudicated a juvenile delinquent for the following: theft in 1985; reckless driving in 1986; and juvenile delinquency (throwing rocks at cars) in 1987. As an adult, Childers had the following convictions in Indiana: a conviction for forgery, as a class C felony; four convictions for theft, as class D felonies; a conviction for auto theft, as a class D felony; a conviction for attempted theft, as a class D felony; two convictions for criminal conversion, as class A misdemeanors; a conviction for theft, as a class A misdemeanor; a conviction for resisting law enforcement, as a class A

misdemeanor; and two convictions for illegal consumption, as class C misdemeanors. Childers also was found guilty of trafficking in a controlled substance and possession of marijuana in Warren County, Kentucky. Childers's PSI also listed numerous probation violations and revocations.

The trial court held a sentencing hearing on December 1, 2004. Under Cause No. 1175, the trial court sentenced Childers as follows:

> The defendant shall be committed to the custody of the Department of Correction for fifteen years (15) years. The Court suspends five (5) years. Sentence is consecutive to [Cause No. 1682].
>
> * * * * *
>
> After incarceration, the defendant is placed on probation for a period of five (5) years, concurrent with [Cause No. 1682] . . . .

(App. 54-55). Under Cause No. 1682, the trial court sentenced Childers as follows:

> The defendant shall be committed to the custody of the Department of Correction for three (3) years, all suspended. Sentence is consecutive to [Cause No. 1175].
>
> * * * * *
>
> The defendant is placed on probation for a period of three (3) years, concurrent with [Cause No. 1175] . . . .

(App. 130).

On March 3, 2005, Childers filed a pro se petition for production of guilty plea and sentencing transcripts. The post-conviction court denied the petition on March 18, 2005, "as it was filed more than 30 days beyond the sentencing date and there is no action pending before the Court requiring such a record . . . ." (App. 72, 190).

On June 22, 2005, the State Public Defender's office acknowledged receipt of a petition for post-conviction relief filed by Childers on May 10, 2005.[4] The Public Defender's office informed Childers that he "must have a direct appeal . . . to attack [his] sentence." (App. 92). The Public Defender's office advised Childers to "ask the trial court for permission to file a belated appeal under Post-Conviction Rule 2" and "ask the court to dismiss [his] PCR without prejudice . . . ." (App. 92). The Public Defender's office further advised Childers that "[t]ime is of the essence because [he] must show diligence in order to get permission to file a belated appeal." (App. 92).

On August 29, 2005, Childers filed a petition for leave to file a belated notice of appeal and a petition for appointment of counsel. On November 8, 2005, the post-conviction court appointed counsel for Childers but denied Childers's petition for leave to file a belated notice of appeal without a hearing. Childers filed a notice of appeal on December 1, 2006, while his counsel filed a notice of appeal on December 2, 2005.

Additional facts will be provided.

DECISION

1. Denial of Petition for Leave to File Belated Notice of Appeal

Childers asserts the trial court erred in denying his petition for leave to file a belated notice of appeal. Indiana Post-Conviction Rule 2, § 1 permits a defendant to seek permission to file a belated appeal. It provides in part:

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[4] Neither a copy of the petition for post-conviction relief nor the chronological case summary from that proceeding has been provided. Therefore, we reference a letter from the State Public Defender's office, which is provided in the appendix.

> Where an eligible defendant convicted after a trial or plea of guilty fails to file a timely notice of appeal, a petition for permission to file a belated notice of appeal of the conviction may be filed with the trial court, where:
> (a) the failure to file a timely notice of appeal was not due to the fault of the defendant; and
> (b) the defendant has been diligent in requesting permission to file a belated notice appeal under this rule.
> The trial court shall consider the above factors in ruling on the petition. Any hearing on the granting of a petition for permission to file a belated notice of appeal shall be conducted according to Section 5, Rule P.C. 1.

"Although there are no set standards defining delay and each case must be decided on its own facts, a defendant must be without fault in the delay of filing the notice of appeal." Baysinger v. State, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005). Factors to be considered in determining fault include "the defendant's level of awareness of his or her procedural remedy, age, education, familiarity with the legal system, whether he or she was informed of his or her appellate rights, and whether he or she committed an act or omission that contributed to the delay." Id.

Generally, whether a defendant is responsible for the delay is a matter within the trial court's discretion. Id. We, however, owe no deference to the trial court's decision to deny a petition where the trial court did not hold a hearing because we then must review the same information—the allegations contained in the petition—available to the trial court. Id. In such a case, like the one here, we review the denial de novo. Id.

In this case, Childers's petition alleged the following:

> On the 3rd day of March . . . 2005, a petition for plea and sentencing transcripts was filed.
>
> On the 18th day of March the petition for guilty plea and sentencing hearing transcripts were denied.

> On the 10th day of May 2005, petition for post-conviction relief was filed.
>
> On the 15th day of July, 2005, petition for post conviction relief was withdraw[n] without prejudice . . . .
>
> Plaintiff does not have an attorney representing him in this matter. The plaintiff has been diligent in attempting to appeal (raise sentencing error of a[n] open guilty plea). But without the proper assitace [sic] of a criminal/appellant [sic] counsel, the Plaintiff has been unsuccessful at raising the error to the Indiana Court of Appeals.
>
> Plaintiff states that during sentencing hearing on December 1, 2004 . . . the presiding judge informed of my right[]s of pleading guilty; I give all rights to direct appeal. Pauper counsel did not confirm with me. I had no knowledge of my right to appeal my sentencing decision directly to the Indiana Court of Appeals.

(App. 88-89).

In addressing the merits of Childers's claim, the State does not dispute that the trial court did not inform Childers of his right to appeal his sentence. Rather, it asserts that given Childers's age, level of education, and previous convictions, he should have been aware of his right to appeal his sentence.

It is clear, however, "that a person who pleads guilty is entitled to contest on direct appeal the merits of a trial court's sentencing decision where the trial court has exercised its discretion." Baysinger, 835 N.E.2d at 226. Here, Childers asserts that the trial court did not advise him of his right to appeal his sentence. Furthermore, it appears that Childers diligently sought leave to file a belated notice of appeal under Indiana Post-Conviction Rule 2. Because Childers's failure to file a timely notice of appeal was not due to his own fault, and he was diligent in pursuing permission to file a belated notice of

appeal, the trial court improperly denied his petition. Accordingly, we reverse the trial court's denial of Childers's petition for leave to file a belated notice of appeal.

2. Sentencing

Childers asserts the trial court erroneously sentenced him. Specifically, Childers contends the trial court found improper aggravating circumstances and failed to consider a mitigating circumstance. Childers further contends that his sentence is inappropriate pursuant to Indiana Appellate Rule 7(B).

a. *Aggravating circumstances*

Childers contends that the trial court erroneously sentenced him to enhanced sentences[5] based upon its findings of the following aggravating circumstances: 1) Childers's criminal history, 2) the risk that Childers would commit another crime, and 3) Childers manufactured methamphetamine in a residential area. Childers argues that, with the exception of his criminal history, the aggravating circumstances were not properly found under the standards set forth in Blakely v. Washington, 542 U.S. 296 (2004) because they were neither admitted by Childers nor found by a jury. As to his criminal history, Childers asserts it was insufficient to enhance his sentence because his "record was almost entirely unrelated to [his] current offenses." Childers's Br. 31. We disagree.

[5] The statutory sentencing range for a class B felony is six to twenty years, with the presumptive sentence being a fixed term of ten years with not more than ten years added for aggravating circumstances. Ind. Code § 35-50-2-5. For a class D felony, the statutory sentencing range is one-half year to three years, with the presumptive sentence being a fixed term of one and one-half years. I.C. § 35-50-2-7. Subsequent to the date of Childers's sentencing, the legislature amended Indiana Code section 35-50-2-5 to provide for an "advisory" rather than a "presumptive" sentence. See P.L. 71-2005, § 7 (eff. Apr. 25, 2005).

A single circumstance may be sufficient to support an enhanced sentence. Edwards v. State, 842 N.E.2d 849, 855 (Ind. Ct. App. 2006). In this case, the trial court properly considered Childers' criminal history, which was extensive and included drug-related offenses. This history is sufficient to warrant Childers's enhanced sentences.

b. *Mitigating circumstances*

Childers asserts the trial court overlooked a significant mitigating circumstance, his guilty plea. The trial court must consider all evidence of mitigating circumstances presented by a defendant. Sipple v. State, 788 N.E.2d 473, 480 (Ind. Ct. App. 2003), trans. denied. The finding of mitigating circumstances, however, rests within the sound discretion of the trial court. Id. The failure to find a mitigating circumstance clearly supported by the record may imply that the trial court overlooked the circumstance. Id. The trial court, however, is not obligated to consider "alleged mitigating factors that are highly disputable in nature, weight, or significance." Id. Furthermore, the trial court need not agree with the defendant as to the weight or value to be given to proffered mitigating circumstances. Id. The trial court must include mitigating circumstances in its sentencing statement only if they are used to offset aggravating circumstances or to reduce the presumptive sentence. Ross v. State, 835 N.E.2d 1090, 1093 (Ind. Ct. App. 2005), trans. denied. The trial court need enumerate only those mitigating circumstances it finds to be significant. Id. A guilty plea is not automatically a mitigating factor, and a defendant is not entitled to have it weighed as he suggests. Hedger v. State, 824 N.E.2d 417, 420 (Ind. Ct. App. 2005), trans. denied.

In this case, Childers entered into a plea agreement after numerous motions were filed, causing the State to spend significant time and resources on this case. Accordingly, the trial court did not abuse its discretion in according no weight to Childers's guilty plea. See Gillem v. State, 829 N.E.2d 598, 605 (Ind. Ct. App. 2005) (finding guilty plea not a significant mitigating circumstance where State reaped no substantial benefit and it did not save court's time), trans. denied. Furthermore, in return for Childers's guilty plea, the State dismissed two pending charges against Childers and agreed not to file additional charges arising from a separate incident. Thus, Childers received benefits for his guilty plea adequate for the trial court to conclude that his guilty plea was not a significant mitigating factor. See Gornick v. State, 832 N.E.2d 1031, 1035 (Ind. Ct. App. 2005) ("[A] trial court does not abuse its discretion by not finding a guilty plea as a mitigating factor when a defendant receives benefits for pleading guilty."), trans. denied.

c. *Inappropriate Sentence*

Childers contends that his sentence is inappropriate pursuant to Indiana Appellate Rule 7(B). "Appellate courts have the constitutional authority to revise a sentence if, after consideration of the trial court's decision, the court concludes the sentence is inappropriate in light of the nature of the offense and character of the offender." Id. at 1035.

As to the nature of the offense, Childers admitted that he started manufacturing methamphetamine when it became too expensive to purchase. He stated that at any one time, he would manufacture "between twenty and twenty-two grams" for his own use and

would "give it to friends." (Tr. 28). Less than one month after his arrest for manufacturing methamphetamine, he was found in possession of methamphetamine.

As to Childers's character, as we observed above, he has a substantial criminal history, including felony convictions. Moreover, he has previously had his probation to revoked. Accordingly, prior attempts to rehabilitate Childers and deter him from future unlawful conduct have failed. In light of Childers's criminal history, we conclude that the sentence imposed by the trial court was not inappropriate in light of the nature of the offense and his character.

Reversed in part and affirmed in part.

NAJAM, J., and FRIEDLANDER, J., concur.